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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10803 — Agenda No. 67-13

Daniel D. Canale, as Attorney for Hulcher Soya Products, Inc. (now Prairie Mills, Inc.),

Plaintiff

vs.

Norman E. Hulcher, Frank W. Young and Prairie Mills, Inc., (formerly Hulcher Soya Products, Inc.) a corporation,

Defendants

Springfield Auto Leasing, Inc.,

Intervenor

Appeal from Circuit Court Sangamon County

# # #

Norman E. Hulcher,

Defendant-Appellee

vs.

Prairie Mills, Inc., (formerly Hulcher Soya Products, Inc.) a corporation,

Defendant-Appellant

and

Springfield Auto Leasing, Inc.,

Intervenor-Appellant

CRAVEN, P.J.

Daniel D. Canale filed an interpleader action in the circuit court of Sangamon County, deposited $2,869.81 with the clerk of that court and then, by agreement of the named parties defendant, was dismissed as a party.

Three defendants were named in the interpleader action. One, Frank W. Young, disclaimed. The other two, Norman E. Hulcher and Prairie Mills, Inc., each filed answers claiming the deposited funds. Springfield Auto Leasing, Inc., a judgment creditor of Prairie Mills, intervened and sought payment of its judgment in the amount of $170 out of any recovery made by Prairie Mills. A bench trial resulted in a finding in favor of Hulcher and the deposited funds were ordered paid to him. This appeal is by Prairie Mills and its judgment creditor.

This controversy originated out of transactions starting in 1958. In that year, Hulcher Soya Products, Inc., was involved in a bankruptcy proceeding. Norman E. Hulcher was the principal stockholder of that corporation. Young offered to purchase the shares of the corporation and the claims of its creditors for the sum of $250,000. Ultimately this offer was increased to $270,000, an additional $10,000 from Young and $10,000 from Hulcher, the agreement between these two parties being set forth in a letter of January 17, 1958, from Young to Hulcher. That letter is as follows:

" . . .

"Pursuant to our discussion of last evening, this is to confirm my offer to you as I shall outline below:

"On December 5, 1957, I amended my original offer in the following language:

"'At the suggestion of certain creditors, I hereby increase my offer $10,000.00 and in consideration thereof I will receive the accounts receivable, inventory items and cash on hand due Hulcher Soya Products, Inc., which were heretofore to go to the creditors.

"'In all other respects the offer remains as heretofore submitted.'

"When I shall acquire the Hulcher Soya Products, Inc., and it has received $10,000.00 from these items contained in said amended offer, I wll remit the excess acquired from this source to you in cash, if received by the Hulcher Soya Products, Inc., in cash. In the event such items are not paid promptly, I shall assign, or cause the company to assign, to you those items so that you may proceed in collecting them in whatever manner you wish." . . .

Hulcher accepted this offer. Young acquired the shares of the corporation, the corporate assets, the accounts receivable. The corporate name was changed to Prairie Mills, Inc.

The accounts receivable of the corporation included claims against three bankrupts. These claims, for convenience, will be grouped and referred to as the Butler claims. The Butler claims were the subject of bankruptcy proceedings in Tennessee and Alabama. Canale, a Memphis, Tennessee, attorney, had been retained by the corporation to represent it in

connection with these claims.

In March of 1961 Hulcher contacted Young, then president of Prairie Mills, and offered to purchase the accounts receivable as they were outstanding at the time of the 1958 transfer of corporate ownership. During the course of these negotiations, Hulcher disclosed that Canale had notified him that a distribution had been made on the Butler claims and that $16,307.78 net was due the corporation. At the time of this subsequent meeting between Hulcher and Young in 1961 and subsequent to the transfer of ownership, Hulcher had become indebted to the corporation in the amount of some $7800 and the corporation had small balances on deposit with certain banks, which said balances were outstanding at the time of the 1958 transfer of ownership and left undisturbed in the interval. By agreement of the parties, the distribution on the Butler claims was divided $15,000 payable to and received by Prairie Mills and the balance of $1307.78 was paid to Hulcher. Until the distribution as above set forth the corporation had collected nothing on the accounts receivable outstanding in 1958. On March 28, 1961, Young wrote Hulcher indicating that he would cause Prairie Mills to assign all receivables of Hulcher Soya Products contained on a list submitted to him at the time of his purchase of the corporate assets to Hulcher individually. On April 1, 1961, Young wrote Hulcher stating that "to comply with my agreement with you expressed in my letter of January 17, 1958," Prairie Mills is

assigning the receivables. The assignment was without warranty or guaranty. Included with the letter was an assignment listing all of the claims except that the Butler claims were not listed thereon. In June of 1963 a final distribution was made of the Butler claims and the sum deposited in the circuit court is the net of that distribution based upon the claim of the corporation as a creditor in bankruptcy.

It is clear that under the terms of the 1958 agreement, Young increased his offer to purchase the corporation in the amount of $10,000 and his additional $10,000 was to be recovered from the receivables of the corporation, then named Hulcher Soya Products. Any excess acquired by the corporation from these receivables was to be remitted to Hulcher individually. It is the contention of the appellant here that the 1958 agreement was superseded by the 1961 contract between Prairie Mills and Hulcher. It is, of course, true that an existing contract may be modified by valid subsequent agreement of the parties and that inconsistencies cannot stand together. Thus, if the new agreement contains terms clearly inconsistent with the prior contract, the fact of inconsistency is a sufficient intention to abrogate the old and substitute the new. Printing Mach. Maintenance, Inc. v. Carton Prods. Co., 15 Ill. App. 2d 543, 147 N.E.2d 443 (1st Dist. 1958).

It is our view that the 1961 agreement did not supersede the 1958 agreement nor are they inconsistent in the sense

of being mutually exclusive. The 1961 agreement, being composed of the assignment and the letters of March 28 and April 1, makes specific reference to the agreement of 1958 and recites that the action outlined therein is to comply with the 1958 agreement.

The only issue in this case is to determine whether Prairie Mills or Hulcher is entitled to the funds deposited in the circuit court. The various and sundry transactions between the parties involving the transfer of bank accounts, payment and credits on feed bills, and open accounts, which we need not relate in detail, together with the 1961 agreement, are asserted by Prairie Mills to amount either to a novation or an accord and satisfaction. We agree with the conclusion of the trial court that the burden was on Prairie Mills to establish that the 1958 agreement was inoperative by some subsequent conduct of the parties. In order to so establish this modification or termination, it must be properly pleaded and established by a preponderance of the evidence. Where, as here, the evidence is conflicting on factual matters, this Court will not substitute its judgment for that of the trier of the facts. (See 1 I.L.P. Accord and Satisfaction, sec. 72.)

We do not find, from our review of this record, evidence of subsequent conduct of the parties manifesting an intent to abrogate the 1958 agreement. Absent the termination

of that agreement, Hulcher was, by its terms, entitled to the funds deposited in the circuit court of Sangamon County. The judgment of the circuit court of Sangamon County so holding is affirmed.

Judgment affirmed.

SMITH and TRAPP, JJ., concur.

50983

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIE WALLER, otherwise called WILLIAM WHITE, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant, Willie Waller, (otherwise called William White) from a conviction in a bench trial for the offense of burglary. Defendant was sentenced to a term of not less than two years nor more than five years in the State Penitentiary. Subsequent to the trial judge's finding of guilt, defendant made motions for a new trial and in arrest of judgment, both of which were denied.

It is defendant's theory of the case: (1) that the alleged fruits of the burglary found on his person were insufficiently identified so as to warrant their admission into evidence against him; and (2) that the evidence adduced at trial failed to prove his guilt beyond a reasonable doubt.

It is the State's theory of the case: (1) that the fruits of the burglary were sufficiently identified and connected with the commission of the offense to warrant their admission into evidence against the accused; and (2) that defendant was proven guilty beyond a reasonable doubt.

This case concerns itself with a burglary committed at the K. & R. Restaurant, 3638 South Ashland Avenue, Chicago, on the evening of April 26, 1965, at approximately 11:15 p.m. In its presentation of the case below, the State called four witnesses to testify, the material portions of which are essentially as follows:

Mary Lou Kucera, the owner of the restaurant, testified that when she had last been present at her establishment at 9:30 p.m. on the evening in question, everything had been locked and a night-

light in the rear had been left burning. Upon her return at 7:00 a.m. the following morning, the witness stated that she made these observations: (1) a side window had been broken, (2) the cigarette machine had been damaged, (3) a knife was missing, and (4) some pennies, which she had last seen in a jar and belonging to one of her day waitresses, were missing. Thereupon, the witness was asked to identify People's Exhibit 1 for identification (the alleged missing knife). Upon examining the exhibit, she answered, "Yes, that is my knife." When asked where she had last seen the knife, the witness replied, "That knife was on the shelf in the back room."

On cross-examination, she testified that she had last seen the jar containing the pennies at 4:00 p.m. on the afternoon of the burglary. Kucera thereafter denied having ever testified before the Grand Jury or given any statements to the police or State's Attorney's Office relative to this matter. At this juncture, counsel for defendant requested that he be furnished with any statements made by this witness to either the Grand Jury or police. The State, in response, denied the existence of any such statements. Counsel for defendant, on oral argument before this court, conceded his contention on this point to be in error, and withdrew it.

Vernon Nelson, a grillman at the restaurant, testified that at approximately 11:15 p.m. that evening he had been summoned downstairs from his residence above the K. & R. Restaurant, by the police. He stated that he had unlocked the restaurant to allow the police access thereto. Once inside, Nelson stated that he observed a broken window and some tampering with the cigarette machine. The witness continued stating that subsequently another police car arrived at the scene with the defendant in their custody. Nelson said he was, at that time, shown a knife by the police. He testified, "I checked where the knife is usually at, but it wasn't there." When shown People's Exhibit 1 for identification and asked if it was the same knife used

by him in his duties, Nelson responded, "Yes, that is for cutting vegetables and meat and that." Asked if this knife was the same knife exhibited to him by the police that night, the witness replied in the affirmative.

On cross-examination, Nelson, when questioned relative to his identification of the knife, stated that it was "identical" to the knife he uses at work "one hundred times a day." The witness said that he had held the knife in his hand and looked at it "real close and I checked it" before making his identification. Nelson professed to be able to identify the knife as belonging to the restaurant because, "You can tell the way you cut with it and the way the blade was shaped" and because, "the way we have it sharpened." The witness stated that when shown the knife at the scene of the burglary, he told the police, "That is the knife."

Police Officer Hector testified that at approximately 11:15 p.m. that night, as he cruised past the K. & R. Restaurant, he had observed numerous lights on in the rear of the building which aroused his suspicion. He stated that the restaurant was on his beat and he was thus familiar with the practice there to leave only one night-light burning. The officer said he approached the restaurant and observed a broken side window. He testified that he then looked to the back room and observed defendant searching around some high shelving. He said that the defendant then turned facing him and gestured to him as if he were rightfully upon the premises. The officer stated that he was able to make a positive identification of defendant because (1) he had seen defendant face to face from a distance of approximately thirty feet, and (2) the rear of the restaurant had been well illuminated that evening, there being two extra lights turned on at the time. Hector pointed out defendant in the courtroom as the man he had seen that night.

The officer accounted that he then exited from the scene to his squad car to summon help. Seeing defendant taking flight north on

Ashland Avenue, Hector said he gave a description of the intruder over his radio and asked that he be apprehended. The witness could remember seeing no other pedestrians on Ashland Avenue at the time. He stated that thereafter Officers McSweeney and Boyle arrived at the scene with defendant in their custody. When confronted with defendant by these two officers, Hector stated that he said, "Yes, that's the man, I'm sure." When cross-examined, Hector admitted that he had requested defendant to put his hat on (which had fallen off as defendant exited from the police car) before making his identification.

Officer Boyle testified that he and Officer McSweeney, in response to a description they had received over their radio, apprehended the defendant in the middle of the 3500 block of South Ashland Avenue where they had observed him walking rapidly. Their search of defendant's person revealed his possession of a knife and 131 pennies. Thereupon, Boyle identified People's Exhibits 1 and 2 (the knife and pennies respectively) as the same items they found in defendant's possession. Boyle likewise pointed to defendant in open court as the man he had apprehended that evening. The officer did not recall seeing any other pedestrians on Ashland at the time of the arrest.

On cross-examination, Boyle stated that defendant, when returned to the restaurant, denied his guilt. The witness was thereafter excused. Officer McSweeney, who had been listed as a State's witness on the indictment, was not called to testify. Thereupon, the State offered into evidence People's Exhibits 1 and 2 as alleged fruits of the offense. Both exhibits were accepted into evidence by the trial judge over defendant's objections.

Defendant was the lone witness testifying in his behalf. He denied his involvement in the burglary. He explained that he was walking from a tavern located at 43rd Street and Ashland Avenue when the police "grabbed" him. Defendant stated that he had been steadily employed at the Wilson and Company plant and resided at 3965 South Drexel Boulevard.

Defendant denied having ever told the police that he lived at 3529 South State Street. This was the extent of the testimony adduced at trial.

Defendant has voiced strenuous objection to the introduction into evidence of the alleged fruits of the offense. Defendant assigns as grounds therefor the absence of identifying and connective testimony which would have established that a theft of these items did, in fact, occur. Alternatively, he maintains that the knife and coins found on his person were insufficiently identified as coming from the burglarized premises.

Defendant explains that by virtue of his employment with a meat packing firm, his possession of a "standard boning knife" can carry with it no indicia of guilt. He further assails the credibility of Nelson's identification of that knife. Defendant points out that the knife clearly bears the trade names "Baggett Brothers" and "Russell" yet none of the State's witnesses have alluded to such distinctive features when purporting to make their respective identification of it.

Relative to the allegedly stolen pennies, defendant is of the position that their disappearance, if at all, could have been attributed by the trier of the facts to any of numerous persons, there having been an appreciable time lapse from the time they were last seen until the alleged burglary. In this conjunction, defendant cites the fact that the owner of the coins was never called to testify, nor was any excuse for her nonproduction ever offered by the prosecution. Defendant claims to have thus been foreclosed from offering any evidence which could have accounted for the disappearance. He argues that there accordingly exists no justifiable basis upon which the court below could have inferred his guilt simply by virtue of his possession, absent some positive identification or establishment of an unbroken sequence of events leading to him. Defendant relies upon the cases of People v. Anthony, 28 Ill.2d 65, 190 N.E.2d 837 (1963), and People v. Judkins,

10 Ill.2d 445, 140 N.E.2d 663 (1957), to support his contentions on this point.

[1] We do not feel defendant's authorities support the proposition of law he expounds. Both the Anthony and Judkins cases concerned themselves with the issue of continuity of possession of certain narcotic drugs seized by law enforcement authorities. These two decisions simply reaffirmed the rule which makes it incumbent on the prosecution to establish continued uninterrupted possession of a seized drug from the moment of such seizure until the time of trial as a prerequisite to that drug's admissibility into evidence against the accused. Neither the report of proceedings before this court, nor defendant's post-trial motions, reveal that defendant's objections to the admission of People's Exhibits 1 and 2 were, at any time, addressed to the absence of the State's continuity of possession. Rather, defendant's objections below were directed exclusively to the absence of sufficient identification and connective testimony. We do not feel that the defendant can be heard to assert such an objection here for the first time. Defendant has waived the objection and is therefore precluded from asserting it. People v. Polk, 19 Ill.2d 310, 167 N.E.2d 185 (1960).

That the knife has been sufficiently identified so as to warrant its admission into evidence, there can be no doubt. Both Kucera and Nelson observed a knife to be missing. Kucera stated that the knife had been kept on the shelf in the back room which was where defendant had been observed "searching" by Officer Hector. Kucera and Nelson each identified the knife in unequivocal and unimpeached language. Nelson had, likewise, identified the knife on the evening of the burglary. Both Nelson and Officer Boyle designated People's Exhibit 1 for identification as the same knife discovered in defendant's possession on the evening in question. Moreover the credibility of Nelson's identification leaves no room for dispute in view of his strong

familiarity with the knife through his repeated use of it. We do not think Nelson's failure to give recognition to the trade names appearing thereon would, by itself, discredit his otherwise positive testimony.

While it is suggested that defendant was in possession of a knife used by him in his trade, we cannot ignore Nelson's account that the knife was "identical" to the one he uses "one hundred times a day." Nor can the fact that the knife may have been of a standard variety operate to refute Nelson's testimony in view of his close observations relative to "the way the blade was shaped" and "the way we have it sharpened."

Similarly, Kucera had placed the pennies in the restaurant within hours of the burglary. Officer Boyle stated that he had found a handful of pennies in defendant's possession upon his arrest and that People's Exhibit 2 for identification were those same pennies. While certainly a quantity of coins cannot be identified with specificity, the rule in burglary cases has long been that property, similar to that which has been recently stolen, is admissible when found in the accused's exclusive and unexplained possession immediately after the taking was committed. People v. Franceschini, 20 Ill.2d 126, 169 N.E.2d 244 (1960). Such a rule emanates from the fact that in a burglary prosecution the gravamen of the offense is the entering or remaining with the intent to commit a felony or theft therein, [Ill. Rev. Stat. (1965) Chap. 38, Sec. 19-1(a)] thus eliminating the necessity of alleging and proving that anything was in fact taken. People v. Figgers, 23 Ill.2d 516, 179 N.E.2d 626 (1962), People v. Gooch, 70 Ill. App.2d 124, 217 N.E.2d 523 (1966).

The case of People v. Sellers, 30 Ill.2d 221, 196 N.E.2d 481 (1964), bears a striking resemblance to the objections raised by defendant. There three cigar boxes and two rolls of pennies were found in the accused's possession shortly after the burglary of a restaurant. The owner of that establishment was unable to determine what brands of

cigars were missing. He furthermore conceded that he "guessed" that he had had some rolls of pennies in a cash drawer which had been pilfered. In considering the defendant's objections to the admissibility of these items, the court said:

> The items in question, however, were the kind of property that is devoid of distinctive features that would enable it to be readily identified. . . . They were found in defendant's possession immediately after the crime was committed, and in our opinion the court did not err in admitting them in evidence.

Cf. People v. Brancztet, 59 Ill. App.2d 381, 208 N.E.2d 416 (1965).

Here, both the coins and knife were discovered in the accused's exclusive control within minutes of the burglary and not more than a block away from the situs of the offense. A large quantity of pennies were missing, and a large quantity of pennies were found on defendant's person. Moreover, defendant was subsequently found to have been in simultaneous possession of a knife, which was positively identified as coming from the K. & R. Restaurant. The absence of testimony relative to the exact number of pennies missing is of no consequence, as an accused's possession of an amount of money comparable to that taken in a burglary is a relevant circumstance. People v. McGuire, 35 Ill.2d 219, 220 N.E.2d 447 (1966).

Defendant next contends that the evidence offered failed to establish his guilt beyond a reasonable doubt. We believe to the contrary. Defendant recognizes that the positive testimony of one credible witness alone, who had ample opportunity for observation, is sufficient to sustain a conviction even though that testimony is contradicted by the accused. People v. Mack, 25 Ill.2d 416, 185 N.E.2d 154 (1962), People v. Gooch, supra, People v. McIntosh, Ill. App. Ct., 1st Dist., No. 50594 (4/6/67).

Hector observed defendant in a well illuminated quarter, face to face, from approximately thirty feet away. The officer was able to make a positive identification of him only minutes later when

the accused was returned to the scene. The officer's request that defendant put his hat back on merely reflects responsibility and a desire to be "sure" on the part of the officer. Defendant answered to Hector's radio description and was apprehended immediately within one block of the K.& R. Restaurant with the fruits of the burglary in his possession. The testimony of the four State's witnesses was corroborating in every respect.

In any event, a jury having been waived, it was primarily for the trial court to determine credibility of the witnesses and the weight to be afforded their respective testimony. People v. Franceschini, supra. The trier of the facts below saw and heard the testimony adduced. He chose not to believe defendant's alibi. With that conclusion, we can find no fault.

For the above reasons, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and BRYANT, J., concur.

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51098

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROMA GLASS, (Impleaded), Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant, Roma Glass, from a conviction in a jury trial for the offense of armed robbery, and pursuant to which he was sentenced to a term of not less than five nor more than ten years in the State Penitentiary. Defendant had been tried below jointly with a codefendant, Pleasant Johnson (hereinafter referred to as Johnson), who was likewise found guilty. Subsequent to the return of the jury's guilty verdict, defendant made motions for a new trial and in arrest of judgment, both of which were denied, and from which he takes this appeal.

It is defendant's sole theory that the evidence offered failed to establish his guilt beyond a reasonable doubt. Defendant cites as the basis of such a contention the inconsistency and improbability of certain portions of the individual testimony of two of the State's witnesses, Paul Twine and Thomas Warner, the purported eyewitnesses to the alleged occurrence.

The State argues to the contrary. They maintain that the credibility and weight to be afforded testimony being reserved for the jury, and that jury having heard and believed the State's proffered testimony, the positive identification of defendant by two eyewitnesses more than suffices to establish the quantum of proof necessary to sustain the conviction.

Inasmuch as certain portions of the testimony offered by the State have been labeled inconsistent and improbable by defendant, we shall endeavor to set forth the unassailed portions of such testimony initially.

On May 21, 1965, at approximately 1:00 A.M., the complainant,

Paul Twine, a resident of 8636 S. Ingleside, Chicago, stopped at a drugstore at 35th and South Parkway, Chicago, to cash a pay check as he traveled home from work. The drugstore was located in his former neighborhood. Upon his arrival at the drugstore, Twine met Thomas Warner, an old friend of some eight to ten years standing. The two conversed and thereafter journeyed to the next door lounge where they had some drinks together and remained until approximately 4:00 A.M. Twine denied having become intoxicated.

Warner had informed Twine that he had just become the father of a baby boy, and had asked Twine to come with him to his apartment to see the baby. Twine consented. At approximately 4:15 A.M., the pair went back into the drugstore to purchase some beer to take back to Warner's residence. Twine, while making the purchase, observed Warner talking with defendant and Johnson, neither of whom did Twine know at the time. Twine could not overhear Warner's conversation with them. Warner testified that he had known Johnson for about a year and had similarly extended an invitation to Johnson to join he and Twine in going to see the baby. Warner denied knowing defendant. He stated that defendant more or less just came along with Johnson once the invitation had been extended. The four thereafter exited from the drugstore and proceeded to Warner's home a block away. During the course of their walk, Twine did not converse with either Johnson or defendant although Warner and Johnson did have a discussion during that time.

The group arrived at Warner's apartment building and entered the vestibule. Once inside, Warner proceeded up the stairway first, at which time Johnson grasped Twine, informing him "This is a stickup." Defendant held Twine at bay from behind with a knife to his neck while Johnson rifled the victim's pockets taking approximately $100.00 in cash therefrom. Warner heard the scuffling, turned around, and saw Twine pinned against the door by the two assailants. Warner hollered,

"Leave the man alone, ... Give the man his money back, this is my buddy." He then hurried down the stairs to assist Twine. Both Twine and Warner credited themselves with having seized the knife from defendant. Defendant and Johnson fled from the vestibule, with Twine and Warner giving chase. Their pursuit proving unsuccessful, they subsequently reported the incident to a policeman patrolling in the neighborhood.

While on the stand, Warner admitted to having been a former narcotics addict. No testimony was offered at the trial relative to either codefendant.

Police Officer Bitoy, who had authored the supplemental police report in this matter, testified that the victim told him that two "unknown" men had robbed him. He said Twine did not know the men's names. He did, however, state that both the suspects' names had been included in the original police report by the beat officer. He conceded that defendant had surrendered himself to the police denying any implication in the crime. This was the extent of the testimony offered by the State.

Defendant first questions the improbability of Twine's presence at such an hour several miles from his own home and his coincidental meeting with Warner. We are unable to envision such an improbability. Twine sought to cash a check, and he knew by virtue of his former residence in the community, that the named drugstore would be willing to accommodate him. A chance nocturnal meeting in a public establishment which remains open until late hours with a person who lives only one block away cannot be said to strain one's imagination.

Defendant next attacks the believability of Warner's alleged invitation to his home at such an unusual hour. While we concede the time of the visit to be somewhat out of the ordinary, certainly the fact that the two were old friends who seldom saw one another and that Warner had just become a father would explain why Warner was anxious to have Twine visit his home.

Defendant next proposes that it is highly improbable that defendant, if he were to commit a crime, would commit it against a person who knew him. Again, we can find no merit to this contention. The case books are replete with offenses of friend against friend. Moreover, the testimony clearly established that the victim did not know either defendant or Johnson, nor did Warner, at any point, introduce them to Twine. While Warner did, in fact, know Johnson, he was, but for his intervention in the scuffle, at no time a participant in their criminal conduct. Furthermore, Warner did not know defendant, nor have we any way of knowing what defendant's motives were for initiating the offense. The fact that both Warner and Twine credited themselves with having seized the knife does not discredit their respective accounts of the events which transpired in the vestibule. It is quite possible that both simultaneously grasped the weapon, or that due to the exigent circumstances coupled with the masculine ego, each honestly believed he had disarmed defendant.

Bitoy's account that Twine informed him that two "unknown" men had accosted and robbed him is not inconsistent with either of the eye-witnesses' testimony inasmuch as the evidence established that Twine did not know the names of his assailants. Nor does the fact that Bitoy had ascertained the then suspects' names from "certain people" on the street demonstrate that Twine did, in fact, know defendant's name. Bitoy had prepared only the supplemental report regarding the offense. Moreover, it was established that the identities of defendant and Johnson had been included in the original report by another officer, such information, one could reasonably infer, having been supplied by Warner. Accordingly, defendant's case of People v. Roe, 63 Ill. App.2d 452, 211 N.E.2d 552 (1965), upon which he relies, is not well taken. In Roe the complainant knew the defendants' names but never supplied the police authorities with that information. Such, of course, is not the case before us.

Defendant calls to the court's attention numerous inconsistencies between Warner's testimony before the Grand Jury (the minutes of which

were introduced into evidence) and subsequently at trial. Before the Grand Jury, Warner had testified (1) that he and Twine had met at approximately 10:00 P.M., (2) that the two went to a lounge at 39th and South Parkway, and (3) that the robbery occurred after he and Twine had visited the baby. Warner, at the trial, attributed his apparently inconsistent testimony to his extremely nervous condition while before the Grand Jury. He stated that he hadn't been sure of the time, and that if he had said 39th Street, he meant to say 35th Street. He further explained that Twine did have occasion to see his baby, but only after the robbery.

Relative to Warner's inconsistent Grand Jury testimony, we agree with the State's contention that the variance was not of a material character in view of certain other positive factors; to wit, (1) both Warner and Twine identified defendant at the trial, (2) Twine had, prior thereto, identified defendant out of a six man police lineup, (3) both purported eyewitnesses had had an ample opportunity for close observation under well illuminated conditions in the drugstore, and (4) all of the alleged inconsistent testimony, if at all, related only to the sequence of events as they unfolded rather than to the elements of positive identification and the essentials of the crime itself.

It is well settled law that the positive identification of only one eyewitness, who had ample opportunity for observation, will suffice to sustain a conviction even if contradicted by the accused. People v. Soldat, 32 Ill.2d 478, 207 N.E.2d 449 (1965), People v. Haywood, 72 Ill. App.2d 109, 218 N.E.2d 790 (1966), People v. McIntosh, Ill. App. Ct., 1st Dist. No. 50594 (4/6/67). Moreover, such a rule is held to operate notwithstanding inconsistencies in the identifying witnesses' testimony where the variance does not relate to circumstances which would preclude a positive identification. People v. Brinkley, 33 Ill.2d 403, 211 N.E.2d 730 (1965).

Defendant's theory is reserved exclusively to an attack upon the credibility of the witnesses. In such a situation, the governing principle has been reiterated in People v. Calcaterra, 33 Ill.2d 541, 213 N.E.2d 270 (1965), where our highest court said:

> Defendant's contention that he was not proven guilty beyond a reasonable doubt is, in essence, an argument that the conflicting evidence should have been resolved in his favor. The solution rests squarely on the credibility of the witnesses, and it is axiomatic that the credibility of witnesses and the weight to be given their testimony is for the jury.

Cf. People v. Beckham, 71 Ill. App.2d 357, 219 N.E.2d 139 (1966). In the instant case, the jurors saw and heard the witnesses. Upon an examination of the record before our court, we can find no inconsistencies or improbabilities in the testimony by which we could conclude that the verdict of the jury was based upon wholly insufficient evidence so as to leave a reasonable doubt as to defendant's guilt. Hence, we cannot disturb the finding of the jury.

For the above reasons, the judgment is affirmed.

AFFIRMED.

BURKE, J., and BRYANT, J., concur.

51247

JEROME EDELSTEIN, Plaintiff-Appellee, v. ANGELO COSTELLI; and, AL SILVERMAN d/b/a CHICAGO SPEEDOMETER SERVICE, Defendants-Appellants.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment on a verdict of the Circuit Court of Cook County in the sum of $2,604.00 against defendant Al Silverman in favor of plaintiff for injuries incurred by plaintiff in an attack by a dog. Defendant Silverman's theory on this appeal is that he neither owned nor harbored the dog. Defendant further contends that where the jury finds the tenant (Costelli) not guilty, the inactive landlord cannot be guilty.

The facts of the case are as follows: Defendant Silverman is the owner of premises at 1230-32 West Jackson Blvd., Chicago, Illinois. Half of the building was leased by Silverman to Angelo Costelli for use as a body shop. The other half was operated by Silverman as a speedometer shop. The dog was owned by Costelli.

On December 16, 1957, the plaintiff, a solder salesman, was walking in the rear of the premises owned by Silverman, when he saw a sign stating Body and Fender Repairs. Since he sold solder the plaintiff opened the door on the side of the building leased by Costelli, walked into the shop and was attacked by a dog. There was a "Beware of Dog" sign on the door, but plaintiff apparently failed to notice it.

Following a jury trial on plaintiff's complaint which consisted of two charges, one in negligence and the other in violation of Chap. 8, Sec. 12(d), Ill. Rev. Stat. 1957, a general verdict was entered against defendant Silverman. The basic issues raised by this appeal are: (1) was the plaintiff in a place where he had a right to be, (2) was there sufficient evidence for the jury to have found that the defendant owned, harbored or controlled the dog.

It is argued that the plaintiff was injured while he was in a place where he had no right to be; that he was a licensee to whom no duty was owed, except the duty not to wilfully or wantonly injure him. The facts of this case do not support the above assertion. Plaintiff was injured on business premises; the nature of the business being indicated by a sign on the building, "Body and Fender Repairs." From this sign an implied invitation extended to all those who had business with the defendant or Costelli. Plaintiff was a solder salesman, an item used in the repair of automobiles. He came onto defendant's premises for the purpose of selling his product.

In Messa v. Sullivan, 61 Ill. App.2d 386, 209 N.E.2d 872, plaintiff was injured when she was attacked by a dog when she entered defendant's residence, which was a part of a large office building, for the purpose of selling printed cards depicting the deaf and dumb alphabet. The court said, at p. 392:

> "We do not agree that the plaintiff was not lawfully on the defendants' premises. From all indications on the exterior of the defendants' building, in its lobby and on the inside of the elevator cab itself, people like the plaintiff could only surmise that the entire building was devoted to business purposes and that it was intended that they should come there on business."

Based on the facts in the instant case and the above authority, it is clear that the plaintiff was injured while in a place where he had a right to be and where the defendant owed him the care due to any business invitee.

Defendant also contends that he was merely the inactive landlord and did not own, harbor or control the animal that injured the plaintiff. Where a fair question of fact is raised by the proof, the finding of the jury will ordinarily not be set aside by the reviewing court as against the manifest weight of the evidence. Hilbert v. Dougherty, 34 Ill. App.2d 174, 180 N.E.2d 699; Augustine v. Stotts, 40 Ill. App.2d 428, 189 N.E.2d 757.

In this case there is evidence of the following facts: the two sections of the building were separated only by a boiler room and a fuel oil tank. During the night the dog was left free in the building and was allowed to roam anywhere through the garage. Silverman testified that the dog was to keep the contents of the building safe. There was a conflict in the evidence of Silverman as to where the dog roamed in the building at night; whether it was in the garage alone or whether it was connected with the building as a whole. This was resolved by the jury, and is binding upon us. Silverman stated that he very seldom fed the dog, that he would throw him something. To the contrary, Silverman testified that he did not own or care for the dog.

[1] From our examination of the record we feel that there was sufficient evidence for the jury to have found that the defendant harbored or controlled, and received the benefits of having his premises protected by the dog that attacked the plaintiff.

The judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

51120

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT
vs.	)	
	)	COOK COUNTY
FRED SMITH, Appellant.	)	CRIMINAL DIVISION.

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

CHARGE: Armed Robbery.*

DEFENSE AT TRIAL: Defendant denied guilt.

JUDGMENT: After a trial before a jury and return of a verdict of guilty, the court sentenced the defendant to the penitentiary for not less than 10 nor more than 15 years.

POINTS RAISED ON APPEAL: The defendant did not receive a fair trial; and defendant was not proved guilty beyond a reasonable doubt.

EVIDENCE: The complaining witness, Jesus Amill, testified that on May 30, 1965, he was working as a driver for the Checker Cab Company; that at approximately 1:15 A.M., at the corner of Madison and Albany Streets, he stopped to pick up two men. He stated that the corner was well-lighted, and as the two men entered the cab a light on top of the dashboard went on, enabling him to see their faces. He stated that the defendant entered first and sat directly behind Amill. He was directed to drive to 3120 West Maypole; when they arrived at that address, the defendant grabbed Amill around the neck and pressed a knife against him. The two men then took $42.50

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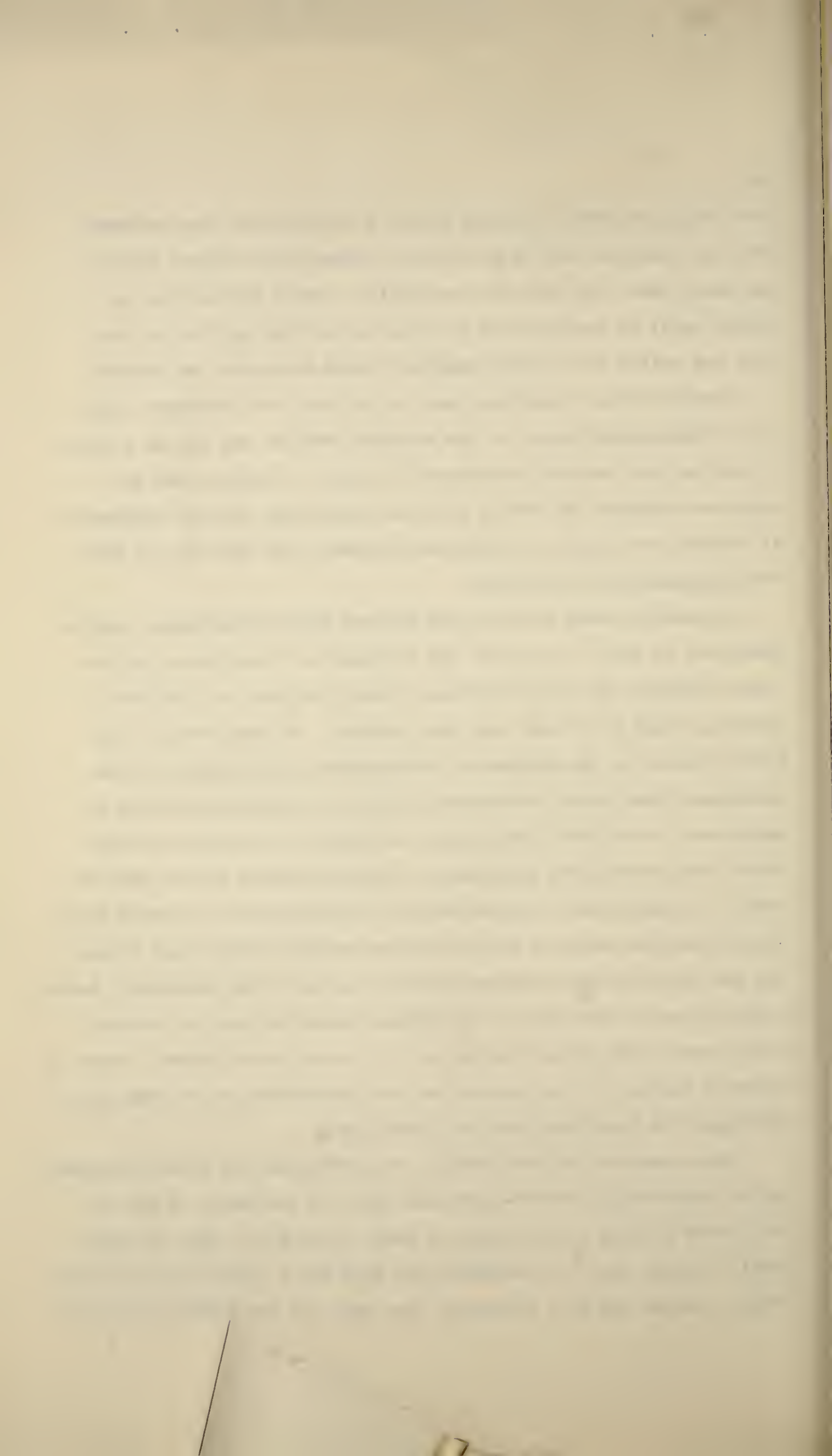
*Ill.Rev.Stat. 1965, ch. 38, § 18-1. Robbery.] (a) A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force.

Ill.Rev.Stat. 1965, ch. 38, § 18-2. Armed Robbery.] (a) A person commits armed robbery when he violates Section 18-1 while armed with a dangerous weapon.
(b) Penalty.
A person convicted of armed robbery shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than one year.



5 o'clock the next morning, and that he was in her apartment during the whole time. She further stated that Les Johnson went home before midnight, and that the other four remained playing cards until after 5:00 A.M.

Joe Nash testified that on May 29 he was present at the Partee apartment when Smith arrived about 10:30 P.M.; that he, Nash, stayed until about 4:30 A.M., and that Smith was there the entire time. On cross-examination, Nash testified that he did not know what time Smith left "because I left about 2:00, I think he left there about 3:30 or 4:30 or quarter to five." He added that Smith was still there when he left.

The defendant contends that he was not proved guilty beyond a reasonable doubt. In this court he argues that the identification was not sufficient. He was identified by Amill, who picked his photograph out of 30 pictures, and was again identified by Amill in a police lineup. The defendant argues that the identification was deficient since the complainant had stated on cross-examination that he concluded that the defendant was his assailant because he "recognized his voice." However, the defendant conveniently forgets the other testimony in the record in which Amill testified that he positively recognized the defendant when he entered the cab. Amill's testimony with reference to the identification of the defendant by his voice refers only to the time when the defendant grabbed Amill around the neck. He stated that he had considerable conversation with the defendant after he entered the cab, and also at the time Amill moved the defendant.

Upon the evidence, the jury was justified in finding the defendant guilty of the crime of armed robbery. People v. Brown, 16 Ill. 2d 482; People v. Cook, 33 Ill. 2d 363; People v. Gray, 24 Ill. 2d 229.

The defendant argues that he did not receive a fair trial because the court did not admit certain alleged records of the Checker Cab Company which would show that when Amill reported the robbery he failed to state that he had previously had the defendant as a passenger in his cab. Amill had testified that he made a report of the incident to the Checker Cab Company and that he did not remember whether or not he stated that he knew the man who had attacked him, although he did state that he told the Checker Cab Company employee what had happened. He further stated that he did not remember whether he told the police that he had seen the man before, although he thought he had told them. In view of the subsequent action of the officers, he evidently had told the police.

At the close of the testimony, counsel for defendant stated that the defense would make an offer of proof with regard to the statement made to the Checker Cab Company by Amill. He stated that his offer was made on the theory that the report would show that Amill did not report that he had known the defendant. He further stated that he could produce a witness from the Checker Cab Company who would testify as to the statement. The statement does not appear in the record, nor is there any indication that there was any offer made by the defense to have it admitted in evidence. In any case, had such an offer been made, without going into any question of its efficacy as an impeaching statement, the trial court would be justified in refusing to admit it on the ground that there was no showing as to its authenticity or who if anybody, in the taxi company's employ took the statement.

The defendant had a fair trial and was convicted beyond a reasonable doubt of the crime of armed robbery. The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ENGLISH, P.J., and DRUCKER, J., concur.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10819 Agenda No. 67-9

Jean Marie Scholz,
Plaintiff-Appellant
vs.
Dale Everett Scholz,
Defendant-Appellee

Appeal from Circuit Court Macon County

TRAPP, J.

Plaintiff appeals from an order dismissing her petition for modification of the child support provisions of a decree for divorce. The court's order found that there had been no change in the material circumstances of the parties since the date of a property settlement agreement and entry of the decree for divorce, assessed the costs against the plaintiff, and fixed the amount of an appeal bond. Such order of the court amounts to a dismissal for want of equity and constitutes a final order. Milhahn v. Wickwire, 333 Ill. App.2d 384; 77 N. E.2d 428.

Under the decree for divorce, petitioner was awarded the custody of four minor children and defendant was ordered to pay $125.00 per month for each child as support. It is alleged that conditions have changed in that at the time

of the settlement and decree the minor children were insured under hospital and medical insurance plans, but that such insurance has been discontinued. It is further alleged that medical services have been required in that one child was hospitalized for three days and that defendant has refused to pay the expenses incurred. This totalled $150.00, i.e., $120.00 for hospitalization and $30.00 for medical fees.

There are additional allegations that defendant is a physician and well able to provide such medical services, but that he has refused to pay any part of them. The prayer of the petition is that the decree be modified to require defendant to pay all medical expenses and to pay petitioner's attorneys' fees and costs of suit.

The petition and the proceedings thereunder are to be considered in the light of a property settlement executed and made effective at the time of the divorce decree. In addition to the child support recited, petitioner received the home, its furnishings and an automobile. There was provision and settlement for the real estate in which the parties were interested, and in lieu of alimony, the sum of $62,275.00 was to be paid to plaintiff in 121 monthly payments of varying amounts. During the period at issue, petitioner was receiving $400.00 per month. There was thus received for alimony and support, a total of $10,800.00 per year.

The settlement agreement provided that the parties would contribute in accordance with their respective abilities

toward college expenses of the children. It appears that one son attends a university upon an athletic scholarship. No issue is made under this provision.

The written agreement of settlement between the parties made no provision for insurance, in any form, and more particularly, we find no provision (1) that defendant, or any other party, was required to maintain effective hospital and medical insurance coverage, or (2) any provision that defendant was required to pay the hospital or medical expenses incurred in behalf of the children. It is agreed by the parties that there was insurance coverage for such hospital and medical expense in effect at the time of the agreement and decree, but that such was discontinued about a year thereafter. Plaintiff testified that there was an oral agreement that the insurance would be maintained, while defendant testified that the matter was not discussed at all.

The care of the children is a joint responsibility of the parents. Saxon v. Saxon, 20 Ill. App.2d 477; 156 N. E.2d 229. The petition for modification does not allege a material change in the circumstances of the parties, it only being alleged that the defendant is able to pay the accounts in evidence. The burden is upon the petitioner to show such material changes and circumstances as would justify modification of the decree. Patterson v. Patterson, 28 Ill. App.2d 76; 170 N. E.2d. 11.

The record suggests, but does not explain, certain

discussions and negotiations between the parties which have resulted in disagreement upon the demands of the petitioner. This seems to be the issue between the parties rather than the welfare of the children.

Plaintiff urges that modification of the decree is required under the authority of Kelleher v. Kelleher, 67 Ill. App.2d 410; 214 N. E.2d 139. The controlling factor in that case appears to be that subsequent to the decree providing child support, it was discovered that one child was mentally retarded so that special care and education would be required indefinitely. Again, the petition presented allegations stating elements of material change in the circumstances of the parties. Hilliard v. Anderson, 197 Ill. 549; 64 N. E. 326 is also cited by plaintiff. In that case the opinion turned upon the court's acceptance of evidence that the amount fixed as child support was to be for a short period of time only. Again, the factor of a settlement between the parties was not present.

In the light of the allegations of the petition, and of the circumstances in evidence, we find no abuse of discretion upon the part of the trial court in dismissing this petition at plaintiff's costs.

Judgment affirmed.

CRAVEN, P.J. and SMITH, J. concur.

51432

JOHNNIE WESLEY, Plaintiff-Appellant	)	APPEAL FROM THE
vs.	)	CIRCUIT COURT OF
POLICE BOARD OF THE CITY OF CHICAGO, et.al., Defendants-Appellee	)	COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Cook County, upon plaintiff's motion for administrative review, affirming the action of the Police Board of the City of Chicago. The plaintiff's theory on this appeal is that the findings and decision of the Police Board were unsupported by substantial evidence and are against the manifest weight of the evidence.

Plaintiff was charged before the Police Board with having violated Chicago Police Department Rule 374, Section 5, prohibiting "Conduct Unbecoming a Police Officer", and with having violated Rule 374, Section 6, prohibiting "Immoral Conduct." Specifically, plaintiff was charged and found guilty of having permitted truant juveniles to come to his apartment at a time when they were required to be in school, of having served alcohol to juveniles, and of having had sexual intercourse with Dorothy McMath, age 17, a female who was not his wife, and of having made improper advances towards one Joan McPherson, age 16, a female.

Dorothy McMath (now Fluellen) was unmarried and a student at Hirsch High School at the time she first met the plaintiff. She testified that she met the plaintiff while he was in police uniform at a restaurant where she was working. Plaintiff gave her his address and telephone number and told her to call him. Thereafter she went to his apartment on a number of occasions, usually during a time when she was supposed

to be in school. The witness also testified that on at least one of these visits she had sexual intercourse with the plaintiff. At other times she visited the apartment with Joan McPherson, also a student at Hirsch.

Joan McPherson testified that she first met the plaintiff in January 1964 when she was a second year student at Hirsch, when she went to his apartment with Dorothy McMath. The witness testified that she saw Dorothy McMath and the plaintiff in bed together and that the plaintiff and Dorothy McMath had been drinking whiskey together. The witness also testified that she visited the plaintiff's apartment on a number of other occasions, on one of which the plaintiff asked her if she was going to give him "some loving."

Sandra Pratt and Charles Houke, both students at Hirsch High School, testified that they had been in the plaintiff's apartment during a time when they were supposed to be in school and that they had been there with Dorothy McMath and Joan McPherson.

The plaintiff admitted that the four witnesses had been in his apartment on March 10, 1964 and on other occasions. He denied serving alcoholic beverages or of making an improper advance to Joan McPherson, or having had sexual intercourse with Dorothy McMath on March 10, 1964.

Plaintiff's theory is that there is no substantial evidence to support the police board's findings that he had allowed truant juveniles to visit his house and that he had served alcoholic beverages to them; and, that the board's finding that he made improper advances to a female not his wife and that he had intercourse with Dorothy McMath are against the manifest weight of the evidence.

It is clear that on administrative review it is not the function of this court to weigh the evidence, but to

ascertain if the findings and decision of the administrative agency are against the manifest weight of the evidence. DeGrazio v. Civil Service Commission, 31 Ill. 2d 482, 202 N.E.2d 522; Etscheid v. Police Board of Chicago, 47 Ill. App. 2d 124. Where, as here, the issue raised by the plaintiff is that the decision of the Police Board was against the manifest weight of the evidence, the function of this court is clear. The findings and conclusions of the Police Board are deemed prima facie true and correct. Chap. 110, Sec. 274, Ill. Rev. Stat. 1965. We may review these findings of fact to determine if they are supported by the evidence, but they can be set aside only if against the manifest weight of the evidence. Fenyes v. State Employees' Retirement System, 17 Ill. 2d 106, 160 N.E. 2d 810. The mere fact that the evidence is conflicting is not sufficient reason to reverse. Schwarze v. Board of Fire and Police Com'rs.,46 Ill. App. 2d 64, 196 N.E. 2d 724.

Plaintiff's first contention is that the finding of the Police Board that the plaintiff had allowed truant juveniles to come to his apartment at a time when they were required to be in school and that he had served them alcoholic beverages is not supported by the record. There is evidence in the record that the individuals who visited the plaintiff's apartment were truants. It is true, however, that the record does not disclose the ages of the four witnesses. We find this failure to be immaterial. The crux of the charges against the plaintiff is that he had sexual intercourse with one female who was not his wife, and made an improper advance to another. (Chicago Police Dept. Rule 374, Sec. 6)

Plaintiff also contends that the finding that he had had sexual intercourse with Dorothy McMath, and had made an improper approach to Joan McPherson was against the manifest weight of the evidence. Plaintiff alleges that there are inconsistencies in the story of the two girls, that the only evidence

in support of the charge of having had sexual intercourse was the unsupported word of Dorothy McMath. We reiterate that evidence in cases is often conflicting and the mere fact that an administrative agency rules on evidence which is conflicting cannot be made the grounds for reversal by a reviewing court. Schwarze v. Board of Fire and Police Com'rs.,supra. The only inconsistency in the testimony of the two girls is that Joan McPherson testified that she had seen the plaintiff and Dorothy McMath in bed in January 1964, whereas Dorothy McMath testified that she had had relations with the plaintiff only once, on March 10, 1964. This inconsistency falls far short of destroying the credibility of the witnesses' testimony to the point where a reversal would be required.

For the above reasons the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED

LYONS, P.J. and BURKE, J. concur

Filed 7-17-67

No. 67-7

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967.

NANCY KING and JAMES W. HEALD, Plaintiffs-Appellees, vs. ODIE L. GILLAND, Defendant-Appellant.	Appeal from the Circuit Court of Rock Island County, Illinois. Honorable A. J. Scheineman, Presiding Judge.

ALLOY, J.

This is an appeal from judgments entered in the Circuit Court of Rock Island County following a jury trial in a negligence action to recover damages from defendant, Odie L. Gilland, arising from the alleged negligent operation of defendant's automobile. Defendant admitted liability to plaintiffs, Nancy King and James W. Heald, and the trial was held solely on the issue of the amount of damages incurred by plaintiffs. The jury returned verdicts in favor of plaintiff, Nancy King, in the sum of $5,000.00; in favor of plaintiff, James W. Heald, in the sum of $3,500.00; and also in favor of Elsie C. Heald, in the sum of $225.00. No appeal was taken from the judgment in favor of Elsie C. Heald.

On appeal in this Court, defendant contends that the damages awarded plaintiffs, Nancy King and James W. Heald, are excessive and also that such verdicts resulted from error of the trial court in (1) refusing to admit into evidence pictures of defendant's automobile, (2) allowing certain testimony from Dr. Cook, Nancy King's treating physician, and (3) refusing to admit testimony of Dr. Eric Peterson as to prior hospitalization, etc. of plaintiff Heald.

Plaintiff Nancy King testified that at the time of the accident (on September 15, 1965), she was thrown against the steering wheel in the region of her abdomen. She was then 2-1/2 months pregnant. She called her doctor complaining of pain in her stomach and the morning after the accident she started to hemorrhage. She thereafter visited her doctor and he directed her to go home and rest. She continued to hemorrhage and the doctor then put her in the hospital. She was in the hospital for three days. She continued to bleed the first day, but after being treated she was sent home and remained in bed for a period of two weeks. She did, however, continue to spot and bleed for three and one-half months. She testified that during her pregnancy she was nervous and concerned as to whether her baby was going to be all right. She had experienced no hemorrhaging during a prior pregnancy.

Her treating physician, Dr. Cook, testified that he had hospitalized plaintiff, Nancy King, because of her bleeding, and that, after the first day, the bleeding subsided. After the period of hospitalization she continued to have a brownish spotting which was indicative of bleeding and she asked the doctor if the baby would be all right. The doctor testified that he told plaintiff, Nancy King, that it would be impossible to tell whether the baby would be all right until after delivery, even though everything seemed all right. The doctor further testified that it is common for a woman who spots and bleeds during pregnancy to worry as to whether her baby would be all right.

Part of the damages claimed by Nancy King was for damage to her automobile. This damage totaled $656.90 and the wrecker and storage bill was an additional $23.00. Nancy King's medical specials totaled $93.50. The verdict of $5,000.00 was for her total damage for personal injuries and for damage to the automobile.

During the course of redirect examination, counsel for plaintiff, Nancy King, inquired of Dr. Cook, the treating physician, whether a woman who was injured during her pregnancy would have additional anxieties and questions. Defendant objected as calling for speculation and the court then stated:

> "If the doctor has any medical basis for answering, the answer would be admissable, but if you have no medical basis then this is just a guess."

The doctor then stated:

> "No, it is not a guess because anytime a woman who is pregnant spots or bleeds during the pregnancy she worries whether the baby is all right, this is a common thing and I think that every woman that has even been pregnant . . . "

Counsel for defendant interrupted and objected to the "speech" and asked that it be stricken. The court overruled the objection and stated: "This is an answer to the question. Did you finish, Doctor?" The doctor then stated: "Well, I would simply say any time a woman bleeds it creates an anxiety as to whether the baby is all right."

The defendant, on appeal in this Court, complains that the doctor saw the bleeding only once and only knew of the other bleeding and the brownish spotting as a result of the complaints from plaintiff, Nancy King. Defendant contends that the doctor's testimony did not refer to Nancy King but to all womanhood and was, therefore, erroneous and should be the basis for reversal. The complaint of defendant that the doctor's testimony was not based on first-hand knowledge is not a sound objection in the instant case, since the doctor was the treating physician and heard the complaints of plaintiff and formed an opinion based on his actual observations as well as her complaints as to how the injuries would affect her emotionally. The general statement as to the effect of such bleeding on "all womanhood" was first introduced by defendant on cross-examination, at which time the doctor stated, in answer to a question by counsel for the defendant,

"Women always ask during pregnancy if the baby is all right." On a review of the record as to the matters objected to, it is obvious that such testimony should not constitute reversible error. The matters which were being discussed by the doctor and counsel were matters of common knowledge and experience and would not be the basis for reversal (ILLINOIS STEEL CO. v. MANN, 197 Ill. 186).

It is also contended that the verdict in favor of Nancy King was excessive. On the basis of the record in this cause we do not believe that a verdict in the sum of $5,000.00 is excessive. Plaintiff, Nancy King, had suffered a very distressing experience and as shown by the record, she was hospitalized and thereafter forced to rest, continued bleeding and was apprehensive as to the effect of the injury upon her unborn child. In our judgment the verdict of $5,000.00, which included the automobile damage referred to, was not excessive and should not be the basis for reversal or remittitur.

Defendant likewise contends that there was error on the part of the trial court in refusing to admit into evidence, pictures of defendant's automobile which were offered for the stated purpose of indicating to the jury that the plaintiffs could not have been thrown about their automobiles with great force and violence. Only pictures of defendant's automobile were offered and not pictures of the other two vehicles involved. Plaintiff objected to the offer. The trial court sustained the objection and asserted that the court could not see how the picture of defendant's automobile which might show little or no damage could bear on the question of injuries to plaintiff Heald or plaintiff King since it was shown to take only a slight amount of trauma to cause damage. To obtain an accurate picture of the nature of the impact, the court correctly concluded that it would at least have been necessary to offer photographs of all of the three automobiles involved in the collision.

Defendant also complains that the court erred in refusing to admit the evidence of Dr. Eric Peterson with respect to plaintiff Heald's claim for damages. Such evidence was designed to show to the jury that the diagnosis made by plaintiff Heald's doctors on the hospitalization after the accident was presumably the same diagnosis as that on his hospitalization one week prior to the accident. Dr. Peterson testified that he had plaintiff Heald hospitalized from August 29 to September 8 in 1965, as a result of complaints in the lumbar area. The complaints for injuries made by plaintiff Heald as a result of the accident in the cause before us involved his cervical area and his right shoulder. His hospitalization which followed the accident in January of 1966, involved complaints relating to injuries in the cervical area and the right shoulder. The hospitalization in August of 1965 related to hospitalization for complaints in the lumbar area. The trial court correctly ruled that the testimony of Dr. Peterson concerning the August hospitalization was not a proper offer of proof that the findings at the times of both hospitalizations were for the same or similar complaints where the evidence showed that hospitalization in January of 1966 was for injuries or distress in the cervical area.

Plaintiff Heald had testified that he sustained an injury to his lower neck and right shoulder in the collision involved in the instant case. He stated that a portion of his body had come into contact with a doorpost of the car. There was evidence that he had no difficulty with his neck and shoulder the day of the accident before it happened. That night his neck began to stiffen and he had a bruise on the right shoulder. He saw a doctor within two or three days after the accident and didn't work for two weeks after the accident. His shoulder and neck were getting progressively worse. He tried working for two weeks and then remained away from work for another week. Plaintiff Heald experienced a great deal of pain during this time and his arm movements were limited in all

directions. He called the doctor and was hospitalized on January 4, 1966, and for a 7 or 8 day period in the hospital was treated with physical therapy, heat massage and injections in the shoulder. He testified that as a result of the accident he lost wages of $862, had a hospital bill of $345.80 and a medical bill of $55. Plaintiff Heald had been ill prior to the accident and had been treated by physicians for other ailments. The trial court, however, correctly ruled that the testimony would not support the contention of defendant since the prior hospitalization was for disability other than that complained of in the accident. No offer of proof was made following the ruling of the court (CHICAGO CITY RY. CO. v. CARROLL, 206 Ill. 318). Whether the offer was made or not the ruling of the trial court was proper and the exclusion of the testimony of Dr. Peterson would not constitute reversible error.

The verdict in favor of plaintiff Heald in the sum of $3,500.00 could hardly have been deemed excessive and the result of passion and prejudice. The specials established by the evidence totaled $1,262.80. While plaintiff Heald had been ill as a result of other complaints, he was having no difficulty with his neck and shoulder area at the time of the accident or for a period of time prior thereto. The evidence sustained his claim that his hospitalization and loss of work resulted from the accident.

Courts of review are reluctant to disturb jury findings as to damages unless the record on appeal clearly so requires. (MUETH v. JASKA, 302 Ill. App. 289). Courts of appeal would not be justified in reversing jury verdicts or requiring a remittitur on the grounds that such verdicts are excessive unless the court is able to say that the verdicts are so excessive to indicate that the jury was moved by passion or prejudice. (ROBERTS v. CITY OF STERLING, 22 Ill. App. 2d 337). We are not able to say that this was the case as to either of the verdicts in the case now before us.

The judgments of the Circuit Court of Rock Island County will, therefore, be affirmed.

Affirmed.

Stouder, P. J. and Coryn, J. concur.

Case No. 67-14

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1967

CITY OF GENESEO, Plaintiff-Appellant, vs. STANLEY F. MIROCHA Defendant-Appellee	Appeal from the Circuit Court of the 14th Judicial Circuit of Illinois, Magistrate Division for Henry County. Honorable Robert J. Horberg, Magistrate

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STOUDER, P.J.

As the result of an automobile collision occurring within the limits of the city of Geneseo, Stanley Mirocha, Defendant-Appellee, was charged with the violation of two city ordinances. Pursuant to motion, the Circuit Court of Henry County held that such ordinances were invalid and dismissed the charges from which judgments the city of Geneseo, Appellant, appeals.

The sole question before us is whether the city of Geneseo had the power to enact the ordinances which the Defendant is charged with violating. It is well settled that the powers of a municipality over its streets and highways are those delegated by the General Assembly. The General Assembly may assume complete control of the regulation of streets and highways and may deprive the municipalities of any power or authority with respect thereto. Ayers v. City of Chicago, 239 Ill. 237, 87 N.E. 1073. The Motor Vehicle Acts which have been adopted subsequent to 1907 have varied the authority granted to municipalities in order to evolve a workable plan of coordinate responsibility and authority.

Chap. 95½, Section 122, Ill. Rev. Stat. 1965 (Motor Vehicles), provides that the act shall be applicable and uniform throughout the state and that local authorities shall not enact ordinances in conflict with the provisions of the Act.

Additional traffic regulations, when not in conflict with the Act, may be enacted by local authorities, but they shall not be effective unless properly promulgated. Sction 123, Chap. 95½, Ill. Rev. Stat. 1965 (Motor Vehicles), specifies certain respects in which the police power of the municipality in the control of its streets and highways may act.

The first of the ordinances in question makes unlawful the failure to control a motor vehicle and the second provides that it shall be unlawful to operate a motor vehicle without a valid Illinois operator's license in the possession of the operator of the vehicle.

Appellant does not argue that the ordinances fall within any of the specified powers described in Section 123, supra but argues primarily that the ordinances are not in conflict with other provisions of the act as proscribed by Section 122.

We believe that the aforementioned statutes are clear. The regulation and control of the highways of the state shall be uniform. In permitting local authorities to enact traffic regulations not in conflict with the provisions of the Motor Vehicle Act the legislature has recognized that, consistent with the provisions of the Act, local conditions may require additional regulation. Accordingly an ordinance of a local authority is deemed in conflict with the act where there is a provision generally applicable and no reason exists by virtue of local conditions justifying a departure from the uniform application of such provision.

We agree with the trial court that the ordinances in question are in conflict with provisions of the Motor Vehicle Act. The ordinance requiring a motorist to be in full control of his vehicle is vague, uncertain, and is not in accord or consistent with Section 105, Chapter 95½, Ill. Rev. Stat., which defines the offense of reckless driving. Likewise the ordinance requiring an operator's license to be in possession of the operator is in conflict with Section 6-118, Chap. 95½, Ill. Rev. Stat., which in substance provides that no violation occurs if a license, valid at the time of the operation of the vehicle, is thereafter produced to the

the arresting officer or to the court. Each of the ordinances is more restrictive than the corresponding or related provision of the Motor Vehicle Act and hence being in conflict therewith each of said ordinances is invalid.

Finding no error in the judgments of the Circuit Court of Henry County the judgments are affirmed.

JUDGMENTS AFFIRMED.

Alloy, J., and
Coryn, J. concur.

Filed 7-21-67

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PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
vs.	)	COURT OF COOK COUNTY,
SYLVESTER WEBB and EDWARD DANNIE, Defendants-Appellants.	)	CRIMINAL DIVISION.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal by codefendants, Sylvester Webb and Edward Dannie, from their convictions in a joint non-jury trial for the offense of armed robbery. Subsequent to the trial judge's finding of guilt as to each defendant, said defendants made motions in arrest of judgment and for a new trial, both of which were denied, and from which they have joined in this appeal. Defendant, Webb, was sentenced to a term of from one to three years, and defendant, Dannie, to a term of from two to four years, both sentences to be served in the Illinois State Penitentiary.

It is the defendants' sole theory on appeal that the State has failed to prove their guilt beyond a reasonable doubt. The State argues to the contrary.

The facts of the case involve the commission of an armed robbery at approximately 6:00 P.M. on February 7, 1964, at the Temptation Grocery Store in the City of Chicago. The state presented two identifying witnesses at the trial, Joe Roberts, the store manager, and Ermon Booker, his stock boy, both of whom were present in the store at the time of the robbery and professed to have made positive identifications of the accuseds. It is the defendants' contention that the purported identifications were so doubtful and vague that proof of their guilt could not have been established beyond a legal certainty.

Roberts testified that he was positioned at the front of

the store behind the checkout counter when defendant, Dannie, approached him. The defendant Dannie was in Roberts' direct and unobstructed view wearing a green jacket and holding a handkerchief over the lower portion of his face. Roberts accounted for his ability to positively identify Dannie, notwithstanding the shielding handkerchief, as a result of Dannie's previous and frequent visits to his store to purchase cigarettes. Roberts placed two other participants in the store, a man in a tan jacket, who wore a stocking cap over his head, and a man in a black leather jacket who was wielding a gun. Evidence that the grocery store was well illuminated by fluorescent lighting at the time stood uncontested.

Booker's testimony relative to the sequence of events as they unfolded was consistent with and corroborative of that of Roberts in every respect. Booker had been in the rear of the store when he was approached by a man in a black leather jacket who had a gun. Ordered to the front of the store, Booker walked past the defendant, Webb, and observed him attempting to place a stocking cap over his face. He stated that Webb was wearing a tan jacket. He further testified that the third man (Dannie) was wearing a green jacket. Booker told the court that he and Dannie had attended Cregier High School together, but that he could not identify Dannie as a participant because he did not see Dannie's face during the course of the robbery.

On February 20, 1964, Roberts and Booker attended a five man police lineup at which time Booker identified Webb as one of the men involved in the robbery. Roberts did not make any identifications at this lineup. Subsequently however, on June 2, 1964, Roberts went to a second police lineup, also consisting of five men, at which time he made his identification of Dannie. Both of these identifications were corroborated by the testimony of Police Officer Ronald Charles who had been present on the two occasions. During the course of the trial, both Roberts and Booker respectively were able

to point out the man they purported to have witnessed participating in the robbery.

Cross-examination of Roberts revealed that defendant, Dannie, had returned to the grocery store on numerous occasions subsequent to the offense and that on Dannie's alleged initial return, Roberts had failed to notify police authorities. Roberts, accounting for such an inconsistency, stated that Dannie had entered and exited quickly and that he did not have a telephone at his disposal with which to notify the police. The testimony, nonetheless, showed that Roberts had obtained the license number off of a blue Chevrolet driven by Dannie on two of these occasions, which number was turned over to Officer Charles and eventually lead to Dannie's arrest.

Thomas Hozier, called by the defense, testified that Dannie had been present in his home from approximately 5:30 P.M. to 10:30 P.M. on the evening of the occurrence, to practice with a singing group of which he was a member. Hozier based his observation upon the fact that no fines had been levied that month to members for nonattendance, a standard practice within the singing group. The balance of this group, John Carter, Roy Flagg, and Larry Adams testified in person and by stipulation that they could not remember any members missing a rehearsal during the months of January and February of that year although, by their own admission, they could not specifically recall the evening in question.

Defendant, Webb, testifying in his own behalf, denied his implication in the robbery. Webb claimed to have been in the company of a Doris Reilly from and after 4:00 P.M. on the evening in question, at his cousin's apartment several miles from the scene of the offense. He stated further that he had attended Cregier High School and had possibly seen the witness, Booker, there although the two had never associated or known one another.

Police Officer J. Dvorak, called by the defense, testified

to having authored the original police report in the matter as a result of an interview he had had with the State's two eyewitnesses. His notes, which were subsequently telephoned to Police Central Communications Headquarters for typing, described the man in the green coat as the one who had carried the gun. Roberts and Booker had never had the opportunity to examine the officer's notes, nor were those notes available at the trial, as Dvorak testified he had destroyed them. The officer testified to having little recollection independent of the typewritten report. This was the extent of the testimony adduced at the trial.

Defendants have called to this court's attention numerous authorities wherein the reliability of eyewitness identification is assailed. While we do not ignore consideration of the argument, it remains axiomatic that the trial court, as the trier of fact, is in a particularly well situated position to determine the reliability of eyewitness identification of a criminal accused. A reviewing court will not readily substitute its own conclusions unless the proof is so unsatisfactory as to justify a reasonable doubt of guilt. People v. Lawrence, 72 Ill.App.2d 1, 217 N.E.2d 120 (1966).

Defendants cite the absence of multiple identification by the purported eyewitnesses and the nonproduction of customers then present in the store as a basis for the existence of a reasonable doubt as to their guilt. We disagree. The governing and well established rule is that the positive testimony of one credible witness alone, who had ample opportunity for observation, will suffice to sustain a conviction even though that testimony is contradicted by that of alibi witnesses or the accused himself. People v. Evans, 24 Ill.2d 215, 181 N.E.2d 80 (1962); People v. Wheeler, 5 Ill. 2d 474, 126 N.E.2d 228 (1955); People v. McIntosh, Ill.App.Ct., 1st Dist., No. 50594 (4/6/67).

The eyewitnesses' proffered testimony was steadfastly consistent. Each demonstrated his truthfulness and reliability,

Roberts by declining to identify anyone at the first lineup, Booker by his self-professed inability to identify Dannie even though the two had attended school together. The irony is that the defense now claims that Webb was selected from the initial lineup because his face was familiar to Booker on the theory that the latter may have seen Webb in attendance at Cregier High School. The evidence, however, fails to bear out that contention.

Each defendant offered an alibi. As to Webb, the trial judge simply did not believe him in view of Booker's positive identification and Webb's failure to produce corroborative testimony. As to Dannie, the trial judge concluded, and we agree, that it was entirely possible for Dannie to commit the offense and still arrive at his rehearsal no more than 45 minutes late, an event which could have passed unnoticed by his group and not have been made the subject of a fine by them.

Defendant, Dannie, cites Roberts' failure to supply the investigating officer with Dannie's name as grounds for reasonable doubt, under the authority of People v. Roe, 63 Ill.App.2d 452, 211 N.E.2d 552 (1965). Suffice to say, the Roe case is manifestly inapplicable, absent some showing of record that Roberts did, in fact, know Dannie's name at the time. The evidence clearly points to the contrary. Furthermore, Roberts' failure to call the police upon Dannie's initial return to the store carries with it no indicia of doubt. Roberts explained away the apparent inconsistency and thereafter was instrumental in obtaining the license plate number off of Dannie's vehicle.

Defendant, Dannie, likewise relies on People v. Reese, 34 Ill.2d 77, 213 N.E.2d 526 (1966), wherein the court questioned how out of the ordinary it seemed that an accused would attempt a robbery in his own neighborhood especially where he was well acquainted with an employee of the victimized premises. There, of significant difference however, the accused and the employee had

known one another for a number of years, the accused resided in the same apartment building with the employee's mother and sister, and the employee failed to inform his superior that he knew the name of the offender. In any event, Dannie's return to the scene of his crime, while strange and unexplained, cannot by itself operate to raise sufficient doubt so as to warrant a reversal of his conviction. People v. Clemmon, 51 Ill.App.2d 216, 201 N.E.2d 11 (1964).

Lastly, defendants maintain the inconsistency in the police report raises a reasonable doubt as to their guilt. We do not agree. Again, the trier of fact saw and heard the witnesses. Neither Roberts nor Booker were ever afforded an opportunity to verify the authenticity of Officer Dvorak's notes. The circuitous procedure employed in having his notes transcribed certainly was open to the possibility of some clerical error. Moreover, the officer possessed very little independent recollection whereby he could affirmatively attest to the truth or falsity of that report.

Here there existed close contact between accused and confronter under well illuminated conditions for a period of time sufficient to afford ample opportunity for observation. Roberts' identification of Dannie, despite the partial shield of the handkerchief, is not seriously challenged in the minds of this court in view of Roberts numerous prior contacts with him.

For the above reasons, the judgments are affirmed.

AFFIRMED.

BURKE, J., and BRYANT, J., concur.